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(5)

NO. 90-774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAN M. LINKOUS,
Petitioner

v.

THOMAS J. STOVALL, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent Muriel Flake, pursuant to Sup.Ct.R. 24.2 and 15.1, wishes to call to the court's attention that, although the questions presented for review by Petitioner Dan Linkous all complain of procedural rights denied him by the United States District Court or the United States Court of Appeals for the Fifth Circuit, Petitioner can present no record for review that supports or even addresses his personal narrative and hearsay references. The absence of any record regarding his complaints against the judges below prevents Petitioner from proving virtually all of his allegations before this Court.

Petitioner presents five questions for review. Distilling their essence from the argument and repetition, consistent with Sup.Ct.R. 14-1(a), suggests that the following two questions are presented for review by Petitioner:

1. Did the District Court and the Court of Appeals follow the Federal Rules of Appellate Procedure in handling Petitioner's appeal?

2. Did any failure of the District Court or Court of Appeals to follow the Federal Rules of Appellate Procedure regarding access to and transmission of the record justify Petitioner in not meeting the deadline given to file his brief on appeal?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Comes now Muriel Flake, Respondent (Defendant/Appellee below), and would show the following in opposition to the Petition for Writ of Certiorari:

JUDGMENT BELOW

The "Opinions Below" section of Dan Linkous' petition contains both argument and attempted supplementation of the record through Petitioner's own assertions. Respondent cannot go outside the record in

response, and asks that only the statements supported by the appendix be considered. Petitioner's discussion of the opinions and orders in the courts below is an impermissible substitution of after-the-fact briefing avowals for contemporaneous actions, of record, presenting the complaints now made and putting the lower courts in a position to act upon them.

APPLICABLE RULES OF APPELLATE PROCEDURE

Respondent Muriel Flake supplements Petitioner's reproduction of the content of the "Constitution, Statutes, Rules, and Treaties Involved" with the following verbatim text of certain Federal Rules of Appellate Procedure and Local Rules of the United States Court of Appeals for the Fifth Circuit that are also applicable to the issues presented:

Fed.R.App.Proc. 31. Filing and Service of Briefs

(a) Time for Serving and Filing Briefs. The appellant shall serve and file a brief within forty days after the date on which the record is filed. . . .

(c) Consequence of Failure to File Briefs. If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. . . .

Fed.R.App.Proc. 26. Computation and Extension of Time.

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or permit an act to be done after the expiration of such time. . . .

Fifth Circuit Internal Operating Procedure pertaining to Fed.R.App.Proc. 26.

> Extensions of Time—The Court's policy requires the timely filing of all papers within the period of time allowed by the rules, without granting extensions of time, except in those circumstances where it is shown to be impossible to file the necessary document on time. Failure to process appeals timely will cause such cases to be promptly dismissed for want of prosecution, without further notice, under the provisions of Loc. R. 42.

Fifth Circuit Loc.R. 42.3.2.

> In all other appeals when Appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the Court, the Clerk shall enter an order dismissing the appeal for want of prosecution.

Fifth Circuit Loc.R. 30.1 Appendix—Appeals from District Courts and the Tax Courts.

Appeals from District Courts and the Tax Court shall be on the original record without requirement of the appendix prescribed by FRAP 30. At the time of filing appellant's brief, appellant shall file 4 copies of the following portions of the district court record, to be bound together, but not in the brief:

> The docket sheet;
>
> The judgment or interlocutory order appealed from;
>
> Any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the district court.

Such copies shall be reproduced on white paper by any duplicating or copying process capable of producing a clear black image, with a cover sheet bearing the case number and style and captioned "Record Excerpts". . . .

Fifth Circuit Internal Operating Procedures
under Loc.R. 30.1—

Optional Contents—

Appellant may add to the mandatory Record Excerpts brief extracts from the pleadings, charge, transcripts or exhibits raised. . . .

The fact that parts of the record are not included in the record excerpts shall not prevent the parties or the Court from relying on such parts. The Court will have before it the entire original record when making its decision. . . .

Petitioner has not accurately punctuated, and has possibly deleted relevant portions of, Loc.R. 11.2 of the Fifth Circuit, which is reproduced in its entirety below:

Local Rule 11.2. Duty of the Clerk.

It is the responsibility of the clerk of the district court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this Court within 15 days from the filing of the notice of appeal or 15 days after the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the clerk of the district court shall advise the Clerk of this Court of the reasons for delay and request an enlarged date for the filing thereof.

STATEMENT OF THE CASE

Petitioner's 25-page "Statement of the Case" is not "concise," as required by Sup. Ct. R. 24.1(g). Far from being "free from burdensome, irrelevant, immaterial, and scandalous matter" as required by Sup. Ct. R. 24.6, it primarily consists of such matter. Even worse, Petitioner's "Statement of the Case" is almost entirely outside the

record. Petitioner makes (here) not the slightest effort to cite even the documents compiled in the appendix to his own petition. Briefing references to statements and actions of a trial judge, not found in the record, are an unacceptable means of bringing supposed "facts" before a reviewing court. *Warner Brothers, Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120 (2nd Cir. 1989).

This Court can, for the purpose of measuring compliance with Sup. Ct. R. 24.1(g), suppose that the "relatively inaccessible" record that Petitioner complains of (Pet. 3) was *completely* denied him by the courts below, yet still take note of Petitioner's ability to cite specific pleadings, court orders, and other documents necessarily prepared or received by him or his former counsel, and readily conclude that Petitioner could have offered this Court at least some form of citation to the record for any portions of his "Statement of the Case" that might be supported by the record. Even allowing for the venting of frustrations by a *pro se* plaintiff convinced of his unjust treatment, Petitioner's "Statement of the Case" should be largely disregarded. The problem is not so much that if contains name calling, defamation, hearsay references, personal narrative, personal beliefs, and demands for change in our legal system. Such matters can simply be disregarded. The probem with Petitioner's "Statement of the Case" is that it contains little else.

Respondent Muriel Flake ran afoul of Petitioner when serving as a court-appointed psychologist in his divorce and child custody lawsuit. (Pet. A. 10). Petitioner sued her in the underlying District Court lawsuit, but the District Court dismissed all causes of action except the RICO allegations against certain defendants, as then

stated in Petitioner's Amended Complaint. (Order excerpted at Pet. A. 9). On July 3, 1989, the District Court signed an order clarifying that Muriel Flake, although not specifically named among the parties dismissed by the order of October 16, 1987, was meant to be dismissed, and that her dismissal was effective with that prior order. (A. 1).

SUMMARY OF ARGUMENT

Petitioner received an adverse divorce and child custody judgment in state District Court in Texas, which he sought to overturn by filing a lawsuit in United States District Court, also in Houston, Texas, in which he sued the judges, court-appointed counselor, and guardian ad litem involved in resolving the dispute, and also sued his wife's divorce attorney and his wife's bankruptcy attorney characterizing the actions of them all as violations of his civil rights under 42 U.S.C. 1983 and 1985. (see Complaint in appendix to co-Respondent's brief). Petitioner also sought to declare a Texas Family Code provision unconstitutional. The District Court indulged Petitioner longer than required, even allowing him to plead RICO causes of action against his opponents, before finally dismissing his lawsuit pursuant to Fed.R.Civ.Proc. 11. That decision is well supported by the pleadings and applicable standards, as briefed by co-Respondents. The lack of merit in Petitioner's appeal rendered it subject to summary dismissal at any point when the Court of Appeals examined Petitioner's pleadings and the action taken in response to them.

The District Court, in furtherance of its responsibility to identify and order payment of the costs that Petitioner had unjustly imposed upon Respondents, retained

the record while the appeal was pending, certifying its partial transmittal in accordance with Fed.R.App.Proc. 11(e). Far from putting Petitioner at a disadvantage after his briefing timetable began to run, the presence of the record in Houston, the lawsuit forum and Petitioner's city of residence, left the record more accessible to him than it would have been in New Orleans.

Even if Petitioner had promptly asserted his present complaint that the record was "made relatively inaccessible to" him (Pet. 3), and neither the District Court nor the Court of Appeals had given him any relief, that still would not have prevented him from filing a brief that was complete except for the page numbers of his record references.

Finally, if Petitioner's ability to prepare a brief was negated by lack of record access, a Court of Appeals could reasonably expect something more from him than inaction for the first 39 of his 40 briefing days. A Court of Appeals, especially considering the Fed.R.Civ. Proc. 11 matters in issue in this case, could reasonably deny an extension of time to a litigant who neither complained of record inaccessibility until the day his brief was due, nor showed that the complaint was not pretextual by submitting a brief that was complete *except* for the page numbers of record references.

ARGUMENT

I. The District Court properly retained the record on appeal, pending resolution of post-trial motions, pursuant to Fed.R.App.Proc. 11(e).

Appellate interpretation of Fed.R.App.Proc. 11(e) is scant and does not address the circumstances presented

in this case. Giving Fed.R.App.Proc. 11(e) a reasonable, rather than an unduly restrictive, reading is all that prior decisions would presumably have done, if they existed. Ruling on Petitioner's motion for the district Court to "Show Authority" for its continued handling of motions after receiving plaintiff's Notice of Appeal, the District Court signed a May 24, 1990 order identifying the subject of those sanctions motions (A. 2) and noting that its rulings on "all pending post-judgment motions" were made "at the request of the Court of Appeals." (A. 3).

The need to rule on pending post-trial motions, such as for sanctions associated with the dismissal under Fed. R.Civ.Proc. 11, presents an excellent example of an occasion when "the record or any part thereof is required in the District Court for use there pending the appeal." Petitioner includes in his appendix several letters from the clerk of the District Court to the clerk of the Fifth Circuit stating that transmission of the record to the Fifth Circuit was being delayed due to pending motions (Pet. A. 39, 40, 41, 43, and 48). Petitioner's appendix also demonstrates that the Court of Appeals made the appropriate request to the District Court that it retain the record pursuant to Fed.R.App.Proc. 11(e), by twice asking the District Court to transmit a "Partial Record." (Pet. A. 42, 47). The District Court's transmittal of the partial record to the Court of Appeals was via two transmittal letters, with the contents of one identified as "partial record *per your request*" (Pet. A. 44), and the other (nine days later) as "partial record on appeal 'per your letter'." (Pet. A. 46).

If such plain communications could leave any doubt, it must be erased by the April 13, 1990 briefing notice

sent to Petitioner himself, which stated as a postscript: "The record on appeal is being retained in the District Court. *Partial* Record on appeal has been filed on this date." (Pet. A. 45). All of the foregoing communications are signed by a deputy clerk for the United States District Court on the letterhead of that court, or by a deputy clerk for the United States Court of Appeals on the letterhead of that court. Unless Petitioner is suggesting that the District Court and the Court of Appeals cannot act through their clerks, but instead judges must personally communicate by letter about transmission of the record in pending cases, then it is obvious that the District Court ordered and the Court of Appeals approved keeping the record in the District Court on appeal while sanctions motions remained pending.

II. Retention of the record on appeal in the District Court, even if it were a violation of Fed.R. App.Proc. 11, did not prevent Petitioner from filing his brief and could have had only the slightest effect, if any, on the content of the brief.

Dan Linkous' Petition for Writ of Certiorari with accompanying appendix is both proof that he could have filed his brief on appeal without any access at all to the record, and an indication of how small a role the documents making up the record have in his argument for relief. First, Petitioner presents only the feeblest of reasons, if any at all, for failing to file his brief, preferring instead to attack the District Court and Court of Appeals as supposed agents of Respondents. Petitioner's *ad hominem* attacks cannot substitute for a showing that he was prevented from filing, or at a minimum greatly impaired in the

preparation of, his appellant's brief. The Fifth Circuit's Internal Operating Procedures under Fed.R.App.Proc. 26, of which Petitioner was charged with knowledge, informed him that the Court of Appeals requires filing of all documents within the periods provided by the rules and without extensions of time, except "where it is shown to be impossible to file the necessary document on time." The Court of Appeals' briefing notice to Petitioner reiterated Internal Operating Procedures in telling him: "Failure to have access to the record will not be considered grounds for extending the time." (Pet. A. 19).

Preferring a moving docket over one scheduled by the litigants, the Court of Appeals gave clear notice that an already-discretionary enlargement of time under Fed.R. App.Proc. 26(b) might be expected to turn on whether a party seeking relief could have filed what he was charged with filing. Petitioner was capable but unwilling, as the content of the record was well within his grasp.

This Fed.R.Civ.Proc. 11 case contains no transcript of trial proceedings to which Petitioner can claim a lack of access. The record on appeal necessarily consisted of documents filed by Petitioner himself, documents filed by opposing parties and delivered to Petitioner, and rulings of the courts below, also delivered to Petitioner. Since Loc.R. 30.1 of the Fifth Circuit requires that separately bound "Record Excerpts" accompany appellant's brief, and Fifth Circuit Internal Operating Procedures under that rule (printed and available as part of the Local Rules) allow an appellant preparing Record Excerpts to include "brief extracts from the pleadings, charge, transcript or exhibits if they are essential to an understanding of the issues raised," Petitioner not only could have, but was *expected to*, cite relevant documents on appeal by refer-

ring to his own page numbering of documents accompanying his own brief. That he could have easily have done so is illustrated further by his having done so with his appendix accompanying the petition before this Court.

III. Even if Fed.R.App.Proc. 11 were violated, and Petitioner's ability to prepare a brief was substantially affected, Petitioner's failure to seek an extension of his briefing deadline until the day his brief was due, coupled with his failure to timely file a brief complete *except* for page numbers of the record, left it well within the Court of Appeals' discretion to dismiss his Appeal for failure to file a brief.

Petitioner's argument to this Court, if separated from all attacks on persons and institutions, and from statements outside the record, is that he did not have to file a brief on the deadline given him by the Fifth Circuit because the District Court and the Fifth Circuit did not follow applicable Federal Rules of Appellate Procedure regarding the record, which rendered his briefing date invalid. Whatever weight this argument might have had if Petitioner had made it reasonably soon after being given a briefing schedule, it can surely be rejected when it is first made forty days after the issuance of the briefing schedule, on the day Petitioner's brief was due. Taken separately, Petitioner's ability to file a brief lacking at most a few page numbers, and his waiting until the due date for his brief to raise a complaint about access to the record, each seems sufficient to allow a court to conclude that Petitioner simply ignored his obligation to file his brief and then sought last-minute relief. Taken together, those two circumstances greatly increase the probability that such is the case.

The United States Courts of Appeals have repeatedly held that litigants who fail to meet deadlines imposed by the Federal Rules of Appellate Procedure or the Local Rules of a given Circuit are subject to ultimate procedural sanctions, such as dismissal. *Connecticut General Life Ins. Co. v. Chicago Title & Trust Co.*, 690 F.2d 115 (7th Cir. 1982); *Taylor v. S&D Enterprises, Ltd.*, 601 F.2d 175 (5th Cir. 1979); *Julien v. Zeringue*, 864 F.2d 1572 (Fed. Cir. 1989); *Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713 (9th Cir. 1989). Appeals are also properly dismissed for filing an essential document, such as an appendix to a brief, that does not comply with a Circuit's Local Rule. *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404 (3rd Cir. 1980). Such cases merely apply on appeal the standards that district courts have repeatedly been authorized to apply to litigants who fail to meet their procedural obligations in district court. Fitting for this case is *Kushner*'s observation that the litigant who appeals the supposed procedural error of the district court should take care to follow the rules on appeal, because "sauce for the goose is sauce for the gander." *Id.* at 407.

Petitioner's argument implies, unless he is to be treated as a special case, that a litigant who believes (even correctly) that a district court has committed a procedural error is thereafter excused from compliance with all later obligations that the applicable rules of procedure impose upon him relating to the subject of the court's error. If Petitioner does not present a special case, then he had an obligation to either seek relief earlier in the hope of not having to prepare a brief, or else file the best brief possible to accompany any last-day request for further relief. A Court of Appeals contemplating what to do with an appellant who took neither approach could reasonably

deny procedural indulgence, not least of all when the appellant was in the Court of Appeals because his approach to litigation in the District Court was so far short of acceptable that he had suffered the sanction of dismissal. Demands by the most burdensome and unreasonable of litigants that they receive a more forgiving standard of compliance than the rules prescribe are not matters deserving this Court's time.

CONCLUSION AND PRAYER

Respondent Muriel Flake therefore prays that the Petition for Writ of Certiorari be denied for failure to present any indication that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

HIRSCH, GLOVER, ROBINSON
& SHEINESS

By: _____

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APPENDIX A

United States District Court
Southern District of Texas
Entered
May 25, 1990
Jesse E. Clark, Clerk
By Deputy:
Signature Illegible

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-3676

DAN M. LINKOUS

v.

HONORABLE THOMAS J. STOVALL, JR., ET AL.

ORDER

Pending before the Court is Muriel Flake's motion to dismiss. Flake correctly points out that by order dated October 16, 1987 the Court granted her motion to dismiss Plaintiff's claims against her. Although the Court granted Plaintiff leave to file a second amended complaint, Flake was not named as a defendant in the second amended complaint.

By a clerical oversight, Flake's name was not removed from the docket sheet. The October 16, 1987 order however, *did* dismiss all claims against Flake. Accordingly, it is hereby

ORDERED that Flake's renewed motion to dismiss is MOOT. It is further

ORDERED that the Clerk shall note upon the docket sheet that all claims against Flake were dismissed as of October 16, 1987.

DONE in Houston, Texas, this 3rd day of July, 1989.

JAMES DeANDA
/s/ JAMES DeANDA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

United States District Court
Southern District of Texas
Entered
July 6, 1989
Jesse E. Clark, Clerk
By Deputy:
Signature Illegible

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-3676

DAN M. LINKOUS

v.

DONN C. FULLENWEIDER, ET AL.

ORDER

Pending before the Court are Charles E. Long's motion for reimbursement of fees and expenses and for sanctions and Plaintiff Dan M. Linkous' motion for this Court to "show authority" for ruling on any motion after he filed his notice of appeal. Long seeks to recover $1,000.00 Plaintiff previously deposited in the registry of the Court according to an order entered by U.S. Magistrate Calvin Botley that was intended to provide Long with relief if his deposition was ultimately found to be a "useless inquiry" or Plaintiff's allegations were found to be "meritless." Long also seeks an additional $2,983.50 for reimbursement of his expenses incurred as a sanction against Plaintiff. Plaintiff has filed a lengthy response to Long's motion, which includes the entire transcript of Long's deposition.

This Court has already found that Plaintiff's original complaint and motion for leave to file a third amended complaint violated Fed. R. Civ. P. 11. *See* Order entered March 23, 1990. Moreover, the Court found that Plaintiff's discovery requests and objections to discovery were filed merely to harass or to cause unnecessary delay or needless increase in the cost of litigation in violation of Fed. R. Civ. P. 26(g) and 28 U.S.C. § 1927. *Id.* The Court concluded that Plaintiff's early attempt to depose forty-five witnesses during a four-week period and the record of proceedings before Magistrate Botley revealed a pattern of discovery abuse that merited sanctions. Nevertheless, after reviewing the transcript of the deposition of Charles Long, the Court cannot conclude that this particular deposition was abusive or concerned entirely with irrelevant matters.

With respect to Plaintiff's motion too "show authority," the Court simply notes that it has ruled on all pending post-judgment motions at the request of the Court of Appeals. Accordingly, it is hereby

ORDERED that Long's motion for reimbursement of fees and expenses and for sanctions is DENIED. It is further

ORDERED that Plaintiff's motion to "show authority" is DENIED.

SIGNED in Houston, Texas, this 24th day of May, 1990.

/s/ DeANDER
JAMES DeANDA,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT